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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL PATRICK KLUNK, Defendant and Appellant.	E069636 (Super.Ct.No. FVI17001966) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

William Hassler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Cohen Butler and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Daniel Patrick Klunk was convicted of making a criminal threat and found to have suffered six prison priors. (Pen. Code, §§ 422, subd. (a), 667.5, subd. (b); all undesignated statutory references are to the Penal Code.) The prison priors were bifurcated from the trial on his substantive crime. Defendant waived jury trial on the prison priors, which were tried to the court. Defendant challenges his waiver, contending that the court "committed a structural error" in accepting the waiver because it failed to "sufficiently advise [him] as to the nature of the right he was waiving, and/or the possible consequences of waiving it." We conclude his failure to object in the trial court forfeited this claim. We further determine that the record shows defendant was sufficiently advised of the consequences of waiving his right to a jury trial, and that he understood them. For the reasons that follow, we affirm the judgment in its entirety.

I. PROCEDURAL BACKGROUND AND FACTS

In July 2017, defendant told his ex-girlfriend that he was going to kill her mother. He was subsequently arrested and charged with making a criminal threat; it was further alleged that he had suffered six prior prison terms.

By agreement of the parties, the trial court bifurcated trial on the substantive crime from the prison priors. At the trial on the substantive crime, the prosecution offered three witnesses: defendant's ex-girlfriend, her mother, and the arresting officer. Defendant's attorney cross-examined the witnesses, and defendant testified. On cross-examination of defendant, the prosecutor sought to impeach him with his felony conviction for false imprisonment; defendant denied the conviction.

During lunch recess, outside the presence of the jury, the trial court broached the issue of bifurcating the prison priors, commenting that if the prosecutor intended to prove those allegations to the jury, then the jury should determine their truth during deliberations. Defense counsel wanted the allegations bifurcated. The prosecutor confirmed his plan to confront defendant with evidence of his prior convictions.[1]

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[1] "THE COURT: . . . I previously bifurcated the issue of [defendant's] prior prison terms. . . . in order to avoid prejudice unduly caused by information about his prior criminality. [¶] . . . [B]ut I'm concerned now because among other things, there is a denial by your client of a conviction for . . . false imprisonment, which might be relevant to this jury. And [the prosecutor] is going to intend to try to prove that to this jury. [¶] As far as I'm concerned, that means that there's no reason to continue the bifurcation. And . . . I'm going to sort of throw it into your lap and tell me, if [the prosecutor] is going to go through and prove this and your client's not going to admit his priors, shouldn't we just have the jury make this decision while it's in deliberations?

"[¶] . . . [¶]

"[DEFENSE COUNSEL]: I would still ask that the prison prior[s] be bifurcated, your Honor.

"THE COURT: Why?

"[DEFENSE COUNSEL]: Well, because . . . I think [defendant] just made an honest mistake.

"THE COURT: Well, you know what? . . . That's a fair interpretation, and it's good. But Mr. [Prosecutor], do you think it was an honest mistake?

"[PROSECUTOR]: No.

"THE COURT: So there's a question of fact here for the jury, and it's something that they are going to be able to look at to determine whether or not they should accept [defendant's] testimony as credible. . . . [¶] And so I don't know of any other way around it. I would always prefer to go through to the end of the trial. I would prefer to have a court trial or an admission of these convictions in the event that somebody does go down for a guilty verdict on a felony. [¶] But as I said, I think that [the prosecutor] is probably going to put together evidence to confront [defendant] on the specifics of this conviction. [¶] Is that what you're tending to do?

"[PROSECUTOR]: Yes, your Honor.

"THE COURT: So he's going to do that. Well, . . . you all think about it . . . . But the reason I bifurcate is to avoid unduly prejudicing the jury based on [defendant's] past. [¶] . . . [¶] . . . But I'm inclined to let it all go before the jury now and let them

[footnote continued on next page]

Following lunch recess, defense counsel informed the trial court that he had talked to defendant, who did not want the jury deliberating his prison priors. The following exchange occurred:

"THE COURT: . . . [¶] Before we took our lunch recess, I mentioned that I did not believe that the necessity for continuing two separate trials, bifurcation, putting a jury back to deliberate, then having to wait until they come to a verdict, and then having the opportunity to decide whether or not [the prosecutor] can prove the charged priors. [¶] I decided that was not something we needed to do since the protection that I was trying to maintain for you was in the event that you did not testify, the jury would not have known of your prior convictions. [¶] [Defense counsel] has told me that he's talked to you, and that you don't want this jury to deliberate on the subject of your prior prison terms. Am I correct about that?

"THE DEFENDANT: Yes.

"THE COURT: So you do understand that you have a right to a jury trial on this subject. [Defense counsel] has gone over with you and explained that to you?

"THE DEFENDANT: Yes.

"THE COURT: Do you agree to waive your right to a jury trial, in the event that you are convicted of the felony as charged, understanding that whatever number of priors

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make the decision as to the truth of the convictions unless there's some kind of admission that takes it out of the necessity of having them to decide. . . ."

that are eligible to be used against you—and there's a washout period, and things like that to consider. But whatever ones that are approved under Penal Code Section 667.5(b), they can result in an additional one year consecutive added to whatever other sentence you might get if you're convicted. [¶] Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: And you want to waive a right to have this jury make a decision as to whether those are valid priors whether they can be used against you, and it's going to be only me, nobody else, that's going to have the final say as to whether or not they are proved beyond a reasonable doubt. [¶] Is that what you want to do?

"THE DEFENDANT: Yes, sir.

"THE COURT: [Defense counsel], are you satisfied he understands exactly what he's doing and how this works?

"[DEFENSE COUNSEL]: I am, your Honor.

"THE COURT: Join in his waiver?

"[DEFENSE COUNSEL]: I join.

"THE COURT: People, do you accept that waiver?

"[PROSECUTOR]: Yes.

"THE COURT: Do you join also in waiving any right to a jury trial on the subject of the 667.5(b) priors?

"[PROSECUTOR]: Join."

The prosecutor resumed cross-examination of defendant, and the jury ultimately found him guilty of making a criminal threat. Without objection, the trial court

discharged the jury. Again without objection, the court held a bench trial on the prison prior allegations and found them true.

II. DISCUSSION

Defendant contends the trial court failed to sufficiently advise him of his statutory right to a jury trial on his prison priors, along with the consequences of waiving that right. He argues that this failure amounts to structural error requiring the reversal of his judgment and sentence. We disagree.

The right to have the jury decide the truth of a prior conviction allegation stems from section 1025, subdivision (b), not from the jury trial provision of article I, section 16 of the California Constitution or the Sixth Amendment of the United States Constitution. (*People v. Vera* (1997) 15 Cal.4th 269, 277.) Thus, a defendant may forfeit a claim that his right to a jury trial on a prior conviction allegation was improperly denied or improperly waived. (*Id*. at p. 278 ["[T]he deprivation of the statutory right to jury trial on the prior prison term allegations does not implicate the state or federal constitutional right to jury trial. Absent an objection to the discharge of the jury or commencement of court trial, defendant is precluded from asserting on appeal a claim of ineffectual waiver of the statutory right to jury trial of prior prison term allegations."]; *People v. Grimes* (2016) 1 Cal.5th 698, 737-738 [defendant forfeited a claim of involuntary waiver of jury trial on prior conviction allegations based on failure to object in the trial court].) Here, defendant forfeited any claim that he improperly waived his right to a jury trial by failing to object.

Furthermore, upon examination of the totality of the circumstances, we conclude that the claim fails on the merits because the record "'"*affirmatively* shows that [defendant's jury waiver was] voluntary and intelligent under the totality of the

circumstances.”’” (*People v. Daniels* (2017) 3 Cal.5th 961, 991 (*Daniels*) (lead opn. of Cuéllar, J.); see *id*. at p. 1018 (conc. & dis. opn. of Corrigan, J.); *People v. Sivongxxay* (2017) 3 Cal.5th 151, 167-170 (*Sivongxxay*).)

Defendant is no stranger to the criminal justice system. (*Sivongxxay*, *supra*, 3 Cal.5th at p. 167 [evidence of defendant’s prior experience with the criminal justice system is relevant to the determination of whether he knowingly waived his rights].) On six occasions, he signed a plea form indicating that he understood he had a constitutional right to a jury trial, that his attorney had explained that right to him, and that he fully understood the right he was waiving. On each of those six occasions, the trial judges determined defendant understood his constitutional rights and intelligently waived them.

Here, in the middle of a jury trial on his current offense, he reaffirmed his desire to waive his right to have the same jury decide the prior prison term allegations. Defendant had witnessed firsthand that the jury was selected from members of the community, and he had the opportunity to participate in their selection. (*People v. Mosby* (2004) 33 Cal.4th 353, 364 [defendant who had just undergone jury trial would have understood jury trial included rights to remain silent and confront witnesses].) He was represented by counsel, who had conversed with him prior to reaffirming his waiver of the right to a jury trial on the prison priors. The trial court addressed defendant directly to confirm such conversation and to clarify that defendant understood his right. The court advised defendant that it was his choice as to whether to have the jury decide the truth of his priors or whether to allow the trial court to decide. After defendant confirmed his wish to waive his right to a jury trial, defense counsel expressly agreed that defendant understood

"exactly what he's doing and how this works." Following his waiver, defendant was present when the court instructed the jury that its decision on the charged offense and any special findings had to be unanimous. After the jury's verdict, defendant expressed no surprise or objection when the jurors were discharged, and the bench trial on the prior prison term allegations began.

Notwithstanding the above, defendant contends the trial court's explanation of the impact of his decision to waive his right to a jury trial on the prior conviction allegations "fell woefully short of meeting the [*Daniels*] requirements." We disagree. In *Daniels*, the California Supreme Court did not set forth any precise dialogue but offered "general guidance for trial courts in ensuring a defendant's knowing and intelligent jury waiver in favor of court trial." (*Daniels*, *supra*, 3 Cal.5th at p. 999 (lead opn. of Cuéllar, J.); see *id*. at p. 1018 (conc. & dis. opn. of Corrigan, J.).) The Supreme Court reiterated its recommendation that the trial court "conduct a waiver colloquy expressly relaying at least four 'basic mechanics of a jury trial': '(1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence.'" (*Daniels*, at p. 999 (lead opn. of Cuéllar, J.); see *Sivongxxay*, *supra*, 3 Cal.5th at p. 169.) However, the *Daniels* court added that "like the United States Supreme Court, we take a '"pragmatic approach to the waiver question"' that considers what would be '"obvious to an accused"' who is executing the waiver. [Citations.]" (*Daniels*, at p. 1019 (conc. & dis. opn. of Corrigan, J.); see *Iowa v. Tovar* (2004)

541 U.S. 77, 88 ["The information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."].)

In our view, the record suggests no misunderstanding on defendant's part regarding the consequences of waiving his right to a jury trial. (*Daniels*, *supra*, 3 Cal.5th at p. 991 (lead opn. of Cuéllar, J.); see *id.* at p. 1018 (conc. & dis. opn. of Corrigan, J.).)

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.